

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Lashawn Sharpe, individually and on behalf of all
other similarly situated,

Plaintiff,

-against-

A&W Concentrate Company and Keurig Dr
Pepper Inc.,

Defendants.

Case No.: 1:19-cv-00768 (BMC)

**DEFENDANTS' RULE 56.1
STATEMENT OF MATERIAL
UNDISPUTED FACTS**

Defendants A&W Concentrate Company and Keurig Dr Pepper Inc., by and through the undersigned counsel, hereby submit the following statement of undisputed material facts in support of their Motion for Summary Judgment pursuant to Local Civil Rule 56.1.

1. The gravamen of Plaintiff's claims is that A&W Root Beer and A&W Cream Soda are labeled as being "made with aged vanilla" but, according to Plaintiff, do not contain vanilla. Complaint ¶¶ 13, 66 – 90.

2. "Aged vanilla" refers to vanilla flavoring derived from vanilla beans that have been cured and conditioned. Transcript of Deposition of Daphna Havkin-Frenkel ("Havkin-Frenkel Tr.") (Exhibit D to the Declaration of Creighton Magid ("Magid Decl.)) at 48:14 – 49:16; Magid Decl. at ¶ 6 and Exhibit E.

3. A&W Root Beer contains two-fold (that is, double strength) vanilla extract supplied by Fimenich SA, one of the world's largest flavor ingredient suppliers. Declaration of Steven Kramer ("Kramer Decl.") at ¶ 3.

4. Firmenich supplied A&W Concentrate Company with documentation confirming that the two-fold vanilla extract used in A&W Root Beer is made from natural vanilla beans. Kramer Decl. at ¶¶ 3 – 4 and Exhibit A.

5. A&W Concentrate Company sent a sample of the Firmenich two-fold vanilla extract used in A&W Root Beer to Krueger Food Laboratories, Inc. for testing. Declaration of Andrew Granda (“Granda Decl.”) at ¶ 2.

6. Krueger Food Laboratories, Inc., a full service analytical testing laboratory that specializes in flavor analysis and that routinely analyzes food and beverage products to determine the presence or absence of natural vanilla extract, tested the sample of the Firmenich two-fold vanilla extract used in A&W Root Beer. Declaration of Dana Krueger (“Krueger Decl.”) at ¶¶ 6 - 7.

7. The testing performed by Krueger Food Laboratories, Inc. identified in the sample all substances indicative of real vanilla extract in the relative concentrations typical of natural vanilla extract. Krueger Decl. at ¶ 7.

8. Based on the test results, Dana Krueger, President of Krueger Food Laboratories, Inc. and a Certified Food Scientist with over 35 years of experience in food testing, concludes, to a reasonable degree of scientific certainty, that A&W Root Beer contains natural vanilla as an ingredient. Krueger Decl. at ¶ 9.

9. A&W Cream Soda contains an ingredient known as “Natural Vanilla WONF” supplied by Givaudan Flavors Corp., another of the world’s largest flavor ingredient suppliers. Kramer Decl. at ¶ 5.

10. Givaudan Flavors Corp. supplied A&W Concentrate Company with a Product Information Material Disclosure confirming that the “Natural Vanilla WONF” ingredient used in A&W Cream Soda contains natural vanilla bean extract. Kramer Decl. at ¶¶ 5 - 6 and Exhibit B.

11. A&W Concentrate Company sent a sample of the Givaudan Flavors Corp. “Natural Vanilla WONF” ingredient used in A&W Cream Soda to Krueger Food Laboratories, Inc. for testing. Granda Decl. at ¶ 2.

12. Krueger Food Laboratories, Inc. tested the sample of the Givaudan Flavors Corp. “Natural Vanilla WONF” ingredient used in A&W Cream Soda. Krueger Decl. at ¶¶ 6, 8.

13. The testing performed by Krueger Food Laboratories, Inc. yielded results typical of a flavoring comprised of natural vanilla extract fortified with added vanillin. Krueger Decl. at ¶ 8.

14. Based on the test results, Mr. Krueger concludes, to a reasonable degree of scientific certainty, that A&W Cream Soda contains natural vanilla as an ingredient. Krueger Decl. at ¶ 9.

15. Plaintiff’s own testing confirms the presence of vanillin in A&W Cream Soda. Krueger Decl. at ¶ 17; Havkin-Frenkel Tr. at 60:20 – 61:5.

16. There is no way for Plaintiff’s testing to determine whether the vanillin found in Plaintiff’s analysis of A&W Cream Soda is from real vanilla beans or from some other source. Krueger Decl. at ¶ 17; Havkin-Frenkel Tr. at 61:6 – 62:8.

17. Daphna Havkin-Frenkel, Plaintiff’s retained expert, concedes that testing flavorings, rather than the soft drinks themselves, is a superior means of determining whether A&W Root Beer or A&W Cream Soda are made with natural vanillin from vanilla beans. Havkin-Frenkel Tr. at 22:21 – 23:1; 28:18 – 29:5.

18. Dr. Havkin-Frenkel was unable to analyze the flavorings used in A &W Root Beer or in A&W Cream Soda, however, because Plaintiff's counsel did not provide them to her. Havkin-Frenkel Tr. at 23:3 – 23:18.

19. Rather than testing the flavorings used in A &W Root Beer or in A&W Cream Soda, Plaintiff tested samples of A &W Root Beer and A&W Cream Soda using gas chromatography mass spectrometry. Havkin-Frenkel Tr. at 32:11 – 34:16; Krueger Decl. at ¶ 11.

20. The gas chromatography mass spectrometry testing undertaken on behalf of Plaintiff apparently analyzed the beverages in total ion mode ("TIM"), which is useful for general screening, but not sensitive enough to detect compounds present in low concentrations. Krueger Decl. at ¶ 12.

21. Had Plaintiff's testing instead analyzed the beverages in selected ion mode ("SIM"), in which measurement is not made of all of the ion masses produced by the mass spectrometer, but rather on certain specific masses that are known to be indicative of the substance(s) of interest, the sensitivity of the gas chromatography mass spectrometry for detection of vanilla compounds could have been increased between 10 and 100 times from Plaintiff's apparent TIM analysis. Krueger Decl. at ¶ 12.

22. By not using SIM analysis and focusing on the particular target substances indicative of real vanilla extract, Plaintiff's testing reduced the likelihood that chemicals indicative of real vanilla extract would be found. Krueger Decl. at ¶ 13.

23. Additionally, unless Plaintiff's testing laboratory took particular care in preparing the samples of A&W Root Beer and A&W Cream Soda, it is unlikely that Plaintiff's test methodology would be able to detect vanillic acid or hydroxybenzoic acid – two of the four compounds indicative of real vanilla extract. Krueger Decl. at ¶ 14.

24. Dr. Havkin-Frenkel concedes that she is unaware of the sensitivity of the testing that was performed on Plaintiff's behalf. Havkin-Frenkel Tr. at 36:11 – 38:15; 41:5 – 43:2.

25. Because of the chemical complexity of root beer and cream soda, the lack of sensitivity in Plaintiff's testing as well as interference from other co-eluting substances, means that testing root beer and cream soda themselves would likely not detect real vanilla extract even if the beverages were made with real vanilla extract. Krueger Decl. at ¶ 4.

26. Plaintiff's gas chromatography mass spectrometry analysis is therefore inconclusive as to the presence or absence of real vanilla in A&W Root Beer or A&W Cream Soda. Krueger Decl. at ¶ 15.

27. Dr. Havkin-Frenkel concedes that the testing performed on behalf of Plaintiff is incapable of determining whether the vanillin in A&W Root Beer and in A&W Cream Soda is derived from real vanilla beans. Havkin-Frenkel Tr. at 21:7 – 21:23; 27:5 – 29:5.

28. Dr. Havkin-Frenkel concedes that determining whether the vanillin in A&W Root Beer and in A&W Cream Soda is derived from real vanilla beans, in the absence of testing the flavorings themselves, would require a very expensive test – known as an isotopic ratio test – that Plaintiff did not employ. Havkin-Frenkel Tr. at 21:14 – 21:23; 68:17 – 68:22.

29. Dr. Havkin-Frenkel concedes that, without testing the flavoring itself, there is no way to know whether the vanillin in A&W Cream Soda is derived from a real vanilla bean. Havkin-Frenkel Tr. at 60:25 – 61:18; 67:1 – 67:8.

30. Dr. Havkin-Frenkel does not disagree with Mr. Krueger's conclusion that the test results for the Firmenich two-fold vanilla extract used in A&W Root Beer are typical for a natural vanilla extract of approximately two-fold concentration. Havkin-Frenkel Tr. at 75:23 – 76:4.

31. Dr. Havkin-Frenkel does not disagree with Mr. Krueger's conclusion that the test results for the Givaudan Flavors Corp. "Natural Vanilla WONF" ingredient used in A&W Cream Soda indicate a natural vanilla extract fortified with added vanillin. Havkin-Frenkel Tr. at 76:23 – 77:9.

32. Dr. Havkin-Frenkel concedes that Plaintiff's testing neither establishes that natural vanilla is an ingredient in A&W Root Beer and A&W Cream Soda nor establishes that natural vanilla is not an ingredient in A&W Root Beer and A&W Cream Soda. Havkin-Frenkel Tr. at 77:10 – 77:21 ("There's no proof that there is. There is no proof that there is not.").

33. The labels on bottles of A&W Root Beer and A&W Cream Soda state conspicuously that the beverages are both "naturally and artificially flavored." Magid Decl. at ¶¶ 2 - 3 and Exhibits A and B.

34. The Nutrition Facts Label on bottles and cans of A&W Root Beer and A&W Cream Soda state that the beverages contain both "natural and artificial flavors." Magid Decl. at ¶ 2 and Exhibit A.

35. Plaintiff filed the Complaint in this matter on February 7, 2019. ECF 1.

36. Plaintiff first tested A&W Root Beer and A&W Cream Soda between April 12 and April 15, 2019. Magid Decl. at ¶ 7 and Exhibit F.

37. Plaintiff withdrew its first test results and substituted the results of a second gas chromatography mass spectrometry analysis, which was performed on August 22, 2019. Magid Decl. at ¶¶ 8 - 9 and Exhibit G.

Dated: December 23, 2019

Respectfully submitted,

/s/ Creighton R. Magid
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*Attorneys For Defendants A&W CONCENTRATE
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I caused copies of the foregoing
DEFENDANTS' RULE 56.1 STATEMENT OF MATERIAL UNDISPUTED FACTS to be
filed with the Clerk of Court using the CM/ECF system which will send notification of the filing
to all counsel of record.

By: /s/ Creighton R. Magid
Creighton R. Magid